Justice Department Ethics and the McDade-Murtha Citizens Protection Act

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Summary

This is an abridged version of *Justice Department Ethics and Section 801 of the Omnibus Appropriations Law for Fiscal Year 1999*, CRS Report RL30060, without the citations, footnotes, authorities and appendices found in the more detailed presentation.

Section 801 of the omnibus appropriations law, a proposal originally offered by Congressmen McDade and Murtha and passed in October of 1998, P.L. 105-277, requires federal prosecutors to follow state and federal rules of professional ethics in effect in the states where they conduct their activities. It also continues in place the sixty year old directive that federal prosecutors follow the ethics rules promulgated by the states in which they are licensed to practice. Proponents claim the change will confirm that federal prosecutors must follow the same ethical rules as other lawyers and will enhance the prospect of some protection against wayward federal prosecutors. Opponents charge that it will implicitly undermine the Attorney General's authority to preempt state laws that conflict with federal law enforcement interests and that in doing so it will jeopardize the use of undercover techniques against terrorists, drug kingpins and child predators.

Section 801

Section 801 of P.L. 105-277, declares that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."

The phrase "attorneys for the government" is defined to include only Justice Department attorneys and those exercising federal litigation authority, including federal independent counsel. The Attorney General is empowered to promulgate the regulations necessary to implement the statute's instructions. The section's provisions become effective six months after the date of enactment.

Elsewhere the appropriations law reminds the Department of the Justice that its attorneys must comply with the ethical standards of the state bars to which they are admitted.

Legislative Background

Section 801 is a remnant of concerns that extend back to the 101st Congress when the House Government Operations Committee recommended among other things a thorough examination of the ethic rules applicable to Department attorneys and expressed concern over "the problems inherent in any system of self-policing and regulation," H.Rept. 101-986, at 35 (1990).

The issue lay dormant until the 104th Congress, when Representative McDade introduced a bill, using essentially the same language as the recently passed section 801. The House Judiciary Courts and Intellectual Property Subcommittee held hearings, but Congress took no other action.

Congressman McDade reintroduced the measure early in the 105th Congress (H.R. 232). He and Congressman Murtha offered a second measure, the Citizens Protection Act (H.R. 3396), which identified various forms of punishable conduct and established a Misconduct Review Board to ensure enforcement of basic ethical standards. There were no committee hearings held, nor reports issued, on either bill, but the House Appropriations Committee incorporated the Citizens Protection Act into its omnibus appropriations measure (H.R. 4276). The Committee's report tersely explained that the portion of the bill which was eventually enacted was designed to confirm that the Attorney General did not have the authority to exempt Department attorneys from the ethical standards to which other attorneys were held. The Senate version of the measure had no similar provision.

The conference committee for the appropriations package stripped out the punishable conduct and review board sections leaving section 801 to be passed with the rest of the compromise bill. Senators Hatch and Leahy, the Chairman and ranking minority member the Senate Judiciary Committee, greeted section 801's passage with dismay and expressed the hope that it would amended prior to becoming effective.

During floor debate on the amendment to strike the Citizens Protection Act from the appropriations package, several Members of the House spoke from personal experience of both specific instances and of general patterns of prosecutorial misconduct. Their disclosures often ended with exasperated observations about the ineffectiveness of existing preventive and remedial measures. They were met by proponents of the amendment who cautioned against overreaction and the dangers of subjecting federal law enforcement interests to state regulatory authority.

Apparent Points of Disagreement

While no single source in the legislative background supplies a full explanation or even a full identification of the issues reflected in section 801, the legislative record taken as a whole reveals the positions of proponents and opponents. Proponents maintain:

- there are instances of federal prosecutorial abuse
- traditional checks on federal prosecutorial abuse have eroded; the courts have been increasingly reluctant to use their supervisory powers to prevent or correct prosecutorial abuse; the check once afforded by scarce resources no longer applies; the incentives for abuse have become more attractive
- the judicial remedies available for prosecutorial abuse (retrial) are costly and do little to discourage or punish overzealous prosecutors
- the Department of Justice's system of self-discipline has not been effective
- the disciplinary mechanisms available for enforcement of standards of conduct for the legal profession offer an impartial means of deterring and punishing prosecutorial abuse
- the disciplinary mechanisms are more effective if they can be invoked where the abuse occurs rather than where the prosecutor is admitted to practice
- the Attorney General lacks authority claimed by the Justice Department to waive the ethical standards to which federal prosecutors must otherwise adhere
- the enforcement of standards of professional conduct poses no threat to effective federal law enforcement; should such a threat develop the appropriate response is federal legislation

Critics contend:

- there are few instances of federal prosecutorial abuse
- charges of prosecutorial abuse are the work defense lawyers attempting to encumber effective law enforcement
- the Justice Department has an effective internal means of dealing with any wayward federal prosecutors
- federal prosecutors have and will continue to observe the highest standards of professional conduct, but under the guise of ethical standards policy determinations (in conflict with existing federal policies) states have introduced into the rules, i.e.:

  - "no contact" rules that hamstring undercover and other legitimate investigative techniques

  - requiring the disclosure of exculpatory evidence to the grand jury

  - requiring prior judicial approval before serving a subpoena on an attorney to appear before the grand jury and testify about client-related matters

- the Attorney General has preemptive authority to determine the manner in which federal laws are enforced
- state authorities have no power to preempt conflicting law enforcement policies and standards of conduct founded on federal law

- federal law enforcement policies should be determined by federal authorities not state bar authorities (who are often captives of the defense bar)
- state authorities have no power to pre-empt conflicting federal law enforcement policies and standards of conduct founded on federal law
- requiring federal law enforcement authorities to comply with the multitude of state bar requirements would impair federal multistate investigations

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